

January 25, 2022

Court Holds That Off-Lake Homeowners in Maple Bluff Have Right to Place and Use Community Pier

Today, Dane County Circuit Judge Everett Mitchell issued a decision and final order that four off-lake homeowners in Maple Bluff have the right to place and use a community pier on “Outlot D” in Maple Bluff.

In the 1920s, approximately 100 off-lake homeowners in Maple Bluff were granted an easement in their deeds to access Lake Mendota over Outlot D. These easement rights were granted when Maple Bluff was a farming community, years before it became a Village in 1931. At the time the easement was granted, Maple Bluff was inhabited by farmers and settlers, including Robert M. (“Fighting Bob”) LaFollette. The settlers were progressives who wanted to share the beauty of Lake Mendota with the community and not just a privileged few. The easement on Outlot D is part of their legacy.

As a result of the easement, since at least 1957, there has been a community pier on Outlot D so that off-lake homeowners had the same rights to swim, boat, fish, and picnic that on-lake homeowners enjoyed.

In July 2020, the current owner of Outlot D, Robert Dunn, filed a lawsuit against four off-lake homeowners, Christopher Drewes, Erin Drewes, Christopher Cain, and Patricia Cain, for a judgment declaring that they no longer had the right to place and use a community pier.

Mr. Dunn’s lawsuit undermined the efforts of the founders of Maple Bluff to build a lakeside community where approximately 100 off-lake homeowners would have the right to access Lake Mendota, even if they were unable to afford lakefront property.

After 18 months of litigation, Judge Mitchell agreed with the off-lake homeowners that they have a right to place and use a community pier. The Court stated:

This action is dismissed in its entirety, with prejudice, and without costs or fees to any party. **This dismissal precludes Plaintiff from filing in the future any claims against the defendants named in this particular action based upon the placement of a pier that is substantially similar to the one that has been placed on Outlot D in the Village of Maple Bluff since at least 1957; and any claims based upon the use of such a pier in a substantially similar manner to how community members have used such piers since at least 1957.**

This means that, after the ice melts in the spring, all 100 off-lake homeowners who have the easement in their deeds will be able to place and use a community pier on Outlot D.

A copy of the decision is attached. For more information, please contact Attorney Jon Axelrod or Attorney Deborah Meiners of DeWitt LLP, who represented the off-lake homeowners. Mr. Axelrod’s cell phone is (608) 212-4326 and Ms. Meiners’ cell phone is (608) 213-3671. Their email addresses are jpa@dewittllp.com and dcm@dewittllp.com, respectively.

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01-25-2022
CIRCUIT COURT
DANE COUNTY, WI
2020CV001476

BY THE COURT:

DATE SIGNED: January 24, 2022

Electronically signed by Judge Everett D. Mitchell
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

DANE COUNTY

ROBERT P. DUNN,

Plaintiffs,

v.

Case No. 20-CV-1476

CHRISTOPHER DREWES,
ERIN DREWES,
CHRISTOPHER CAIN, and
PATRICIA CAIN,

Defendants.

DECISION AND ORDER

INTRODUCTION

Before the Court is Defendants' motion that Plaintiff's Requested Dismissal be with Prejudice. Defendants argue, pursuant to Wis. Stat. §805.04(1), that dismissal at this point in the case may only be with leave of Court because Defendants filed and served a responsive motion prior to Plaintiff's Notice of Voluntary Dismissal. Defendants further argue that the Court should exercise its discretion under Wis. Stat. §805.04(2) and order that the action be dismissed with prejudice. Plaintiff asserts that he may voluntarily dismiss the lawsuit without prejudice because Defendants' prior motion did not constitute a "responsive motion" under Wis. Stat. §805.04(1).

Plaintiff also states that he would be willing to dismiss the action with prejudice, however the scope of claims precluded by the dismissal is still disputed.

FACTUAL BACKGROUND

Plaintiff filed the original action in this case on July 16, 2020, seeking a declaration of interest in real property regarding the easement rights of Defendants, and the owners of approximately 100 other off-lake properties. On August 24, 2020, Defendants moved to require Plaintiff to Join as Parties to the Action All Affected Off-lake Easement Holders. On March 30, 2021, the Court granted Defendants' motion. Plaintiff filed an amended complaint on July 23, 2021 alleging private nuisance and trespass claims. Both the claim seeking a declaration of interest in real property and the private nuisance and trespass claims arise out of an easement granted to Defendants in their respective deeds to access Lake Mendota using Outlot D and the placement of a pier on Outlot D. On August 25, 2021, Plaintiff filed a Notice of Voluntary Dismissal, claiming to "voluntarily dismiss the above-captioned action without prejudice, costs or attorney's fees to any party." Defendants' filed a Motion that Plaintiff's Requested Dismissal Be With Prejudice on the grounds that Plaintiff cannot voluntarily dismiss his action with leave of Court.

DISCUSSION

Defendants move to request that Plaintiff's requested dismissal be with prejudice. The first issue before the Court is whether Plaintiff requires leave of Court to dismiss the action. Next, the Court must determine whether the action should be dismissed with prejudice. The final issue before the Court is what future claims are precluded if the action is dismissed with prejudice.

I. Plaintiff Requires Leave of Court to Dismiss the Action.

Wis. Stat. §805.04(1) is the statute governing voluntary dismissal of actions. Wis. Stat. §805.04(1) states that "an action may be dismissed by the plaintiff without order of court by

serving and filing notice of dismissal at any time before service by an adverse party of *responsive pleading* or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action.”(Italics added) Absent a stipulation, the plaintiff may only dismiss an action in which an adverse party has filed a responsive pleading or motion is “upon order of court and upon such terms and conditions as the court deems proper.” Wis. Stat. §805.04(2).

Defendants argue that Plaintiff requires leave of Court to dismiss the present action pursuant to Wis. Stat. §805.04(1) because Defendants’ Motion to Require Plaintiff to Join as Parties to the Action All Affected Off-lake Easement Holders constitutes a “responsive motion.” Plaintiff asserts that he is not required to move the Court to dismiss the action under Wis. Stat. §805.04(2) because Defendants’ motion does not constitute a “responsive motion” for the purposes of Wis. Stat. §805.04(1). Plaintiff argues that only a motion for summary judgment or motion to dismiss constitute a “responsive motion” under Wis. Stat. §805.04(1).

At this time, no Wisconsin court has interpreted Wis. Stat. §805.04(1) to define a “responsive motion.” When interpreting a statute, courts look to the plain language of the statute. *State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 28, 303 Wis. 2d 570, 735 N.W.2d 131. “In general, we give words and phrases their common and approved meaning and may consult a dictionary if necessary.” *Id.* If this process provides a plain and clear statutory meaning, then there is no ambiguity and the statute is applied according to this meaning. *Id.* The plain meaning of a “responsive motion” is a motion that “giv[es] response” or “constitut[es] a response.” Webster’s Ninth New Collegiate Dictionary 1005 (1990). “Response” is defined as “something constituting a reply or reaction.” *Id.* Given Defendants’ August 24, 2020 Motion contains multiple references to allegations in Plaintiff’s original complaint, responds by alleging conflicting facts, and reacts by moving the Court to require the Plaintiff to join all other off-lake easement holders to the action,

this Court finds that Defendants' Motion constitutes a "responsive motion" under Wis. Stat. §805.04(1).

Additionally, the Marquette Law Review article, *The New Wisconsin Rules of Civil Procedure Chapters 805-807*, cited by both parties supports this plain meaning interpretation of Wis. Stat. §805.04(1) and the Court's finding that Defendants' Motion is a "responsive motion." While comparing Wis. Stat. §805.04(1) and its counterpart Federal Rule 41(a)(1), the article discusses an ambiguity within Federal Rule 41(a)(1) that makes it unclear as to whether a motion to dismiss for failure to state a claim would terminate the plaintiff's right to voluntarily dismiss an action. The article then states that this issue is resolved in Wis. Stat. §805.04(1) by broadening the scope of a defendant's actions that would terminate a plaintiff's ability to voluntarily terminate an action to "wherever the defendant has either filed a responsive pleading or a motion." Patricia Graczyk, *The New Wisconsin Rules of Civil Procedure Chapters 805-807*, 59 Marq. L. Rev. 671, 677 (1976).

II. Dismissal With Prejudice

Wis. Stat. §805.04(2) provides for voluntary dismissal at the plaintiff's request by order of the court and on such terms and conditions as the court deems proper. Dismissal in this way "involves the exercise of judicial discretion and power in weighing the merits for granting dismissal." *Monson v. Monson*, 85 Wis. 2d 794, 803, 271 N.W.2d 137 (Ct. App. 1978). The Court must consider public and private interests when exercising its discretion, including "[t]he public interest [in] efficient judicial administration." *Monson*, 85 Wis. 2d at 803. "If, in the opinion of the trial court, the rights of the defendant, third parties, or the public will be substantially prejudiced by a discontinuance," then a motion for voluntary dismissal may be denied "or be subject to a

dismissal with prejudice.” 10 Wis. Prac., Trial Handbook for Wis. Lawyers § 4:02 (3d ed.) (citing *Russell v. Johnson*, 14 Wis. 2d 406, 111 N.W.2d 193 (1961)).

In the present case, there are significant public and private interests in the dismissal of the present action with prejudice. The dispute regarding whether Defendants and other off-lake easement holders are entitled to a community pier on Outlot D is likely to continue even after dismissal of the present action. Defendants have expressed their intention to continue placing, maintaining, and using a community pier on Outlot D, as they believe they and the other off-lake easement holders are entitled to do so. Plaintiff has also expressed his intention to bring future actions against Defendants and any other easement holders who place, maintain, or use a community pier on Outlot D. This intention is evidenced by Plaintiff’s desire for dismissal with prejudice to allow for him to bring future private nuisance and trespass claims for this very reason. Therefore, both the public and third parties, namely the unnamed off-lake easement holders, have a significant interest in the present case being dismissed with prejudice for the sake of efficient judicial administration.

Defendants would also be prejudiced by a discontinuance due to the significant informal discovery and fact finding they have conducted and legal fees they have accrued. Plaintiff argues that Defendants would not be prejudiced by a discontinuance, as the discovery and fact finding they have conducted would still be useful in future litigation, however Defendants would still be prejudiced by Plaintiff re-litigating these issues because they would still be required to accrue further legal fees to defend their position again.

III. Claims Precluded by Dismissal With Prejudice

The effect of a dismissal with prejudice is determined by the doctrine of *res judicata*, or “claim preclusion,” which “exists to prevent endless litigation.” *Wisconsin Pub. Serv. Corp. v.*

Arby Constr., Inc., 2012 WI 87, ¶ 33, 342 Wis. 2d 544, 818 N.W.2d 863. The doctrine of claim preclusion achieves its goal by “bar[ring] parties from re-litigating any claim that arises out of the same relevant facts, transactions or occurrences” that were at issue in the prior litigation. *Teske v. Wilson Mut. Ins. Co.*, 2019 WI 62, ¶ 23, 387 Wis. 2d 213, 928 N.W.2d 555. To determine whether a future claim “arises out of the same relevant facts, transactions or occurrences” as a past claim, Wisconsin courts treat all the claims arising out of one transaction or factual situation as being part of a single cause of action and require that all such claims be litigated together. *A.B.C.G. Enters., Inc. v. First Bank Se., N.A.*, 184 Wis. 2d 465, 480-81, 515 N.W.2d 904 (1994). This transactional analysis focuses on facts, as “it is irrelevant that ‘the legal theories, remedies sought, and evidence used may be different between the first and second actions.’” *Teske*, 2019 WI 62, ¶36. “Rather, ‘[t]he goal in the transactional approach is to see a claim in factual terms’ and require claims arising from the same facts to be litigated together. *Id.*”

In the present case, it is clear this action arises out of the easement granted to Defendants in their respective deeds to access Lake Mendota and Defendants’ placement and use of a pier on Outlot D. Plaintiff’s original complaint sought a declaratory judgment stating that the placement, maintenance, or use of a pier on Outlot D was not allowed by the easement. Plaintiff’s Amended Complaint brought private nuisance and trespass claims against Defendants for placing or using the same pier.

CONCLUSION

For the reasons stated above, Defendant’s Motion that Plaintiff’s Requested Dismissal be with Prejudice, is GRANTED. This action is dismissed in its entirety, with prejudice, and without costs or fees to any party. This dismissal precludes Plaintiff from filing in the future any claims against the defendants named in this particular action

based upon the placement of a pier that is substantially similar to the one that has been placed on Outlot D in the Village of Maple Bluff since at least 1957; and any claims based upon the use of such a pier in a substantially similar manner to how community members have used such piers since at least 1957.